Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No. _____

In the Supreme Court of the United States

GEORGE JOHNSON,

Petitioner,

v.

THE NEW YORK CITY POLICE DEPARTMENT, HOWARD SAFIR, MICHAEL A. MARKMAN, PATRICK KELLEHER, JOSEPH ANAMONE, JOHN W. CRONIN, ELOISE M. ARCHIBALD, VINCENT MANSFIELD, MACIA ROSS, AND JOHN DOES 1-10

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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3988

QUESTIONS PRESENTED

1. Does the availability of a post-deprivation state judicial remedy always cure a violation of a liberty interest so as to negate a claim under 42 U.S.C. §1983?

2. Are there circumstances under which an alleged violation of a liberty interest may give rise to an action under 42 U.S.C. §1983 regardless of the availability of a post-deprivation state judicial remedy?

LIST OF PARTIES

Petitioner

The Petitioner, George Johnson, has no corporate affiliation.

Respondent

The respondents are: The New York City Police Department, Howard Safir, Michael A. Markman, Patrick Kelleher, Joseph Anamone, John W. Cronin, Eloise M. Archibald, Vincent Mansfield, Macia Ross and John Does 1-10.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The Judgment and Order with Bench Decision of the United States District Court for the Southern District of New York is unreported and is reproduced in the Appendix. The Summary Order of the United States Court of Appeals for the Second Circuit is unreported and is reproduced in the Appendix.

JURISDICTION

The Summary Order of the United States Court of Appeals for the Second Circuit was rendered on December 4, 2001. No rehearing was requested.

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are as follows:

Amendment XIV to U.S. Constitution - Section 1

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

42 U.S.C. §1983

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory of the District of Columbia, subjects, or causes to be subjected, any citizen of the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

STATEMENT OF THE CASE

A. The Relevant Facts

Petitioner applied for the position of Police Officer with respondent New York City Police Department ("NYPD") on at least three (3) occasions, to wit: Exam No. 5177, List No. 3539; Exam No. 0294, List No. 7734; and Exam No. 1007, List No. 9652.

By Notices of Determination dated November 5, 1997, May 12, 1998 and May 12, 1998, respectively, petitioner was advised by respondents that he did not meet the requirements for the position of Police Officer under the said exam numbers.

On each said occasion, petitioner was further advised that said determination of disqualification was based upon psychological unsuitability. More specifically, respondents concluded that "On the evaluation of your psychological tests and interview, which found personality traits incompatible with the unique demands and stresses of employment as a New York City Police Officer."

Petitioner was further advised of his right to appeal said disqualification within thirty (30) days to the New York City Civil Service Commission. Petitioner duly appealed each disqualification to the Civil Service Commission. However, it was not until November and December, 2000, well over two (2) years later, that the Civil Service Commission denied petitioner's appeals.

The Civil Service Commission denied petitioner's appeals, without any hearing and despite the fact that petitioner specifically requested a hearing with respect to each

appeal.

Petitioner submitted that respondents did not honestly believe that he was psychologically unfit to be a Police Officer with respondent NYPD, but, instead, so held because of reasons having nothing to do with his psychological fitness.

Petitioner further submitted that his application process was tainted and beset by procedural irregularity and that respondents' actions were malicious and in bad faith.

More specifically, petitioner alleged that he applied to the New York City Police Department in February, 1993. It reviewed his application until June, 1995 and then gave him a character disqualification claiming that he had a poor driving record. The real reason for this disqualification was because of his previous arrests.

Petitioner applied for the New York City Police Department again in November, 1996. Plaintiff was informed that his arrests were still going to be a problem. A friend of petitioner knew someone who was a personal friend of Chief Michael Markman of the NYPD. He reached out to Chief Markman to help get petitioner the job.

While the NYPD was conducting the second background investigation, Chief Gregg Amato of the Carmel PD recommended that petitioner not be appointed because he was the "town bully." Having interned for the department and being highly recommended by former Chief Evans, petitioner thought this statement was outrageous and unfounded. Chief Amato disregarded petitioner's internship and concluded this based on the two arrests. Chief Amato was eventually forced out of his position due to incompetence.

After this statement was made, Chief Markman of the NYPD said that petitioner would no longer be considered for the position of police officer. For two months, the person who was friends with Chief Markman fought for petitioner by trying to convince Chief Markman that Chief Amato was incompetent and that petitioner was not a "town bully." At this point in time, Chief Markman did not want to disappoint his friend so he qualified petitioner's background and scheduled him for a psychological. Chief Markman had no intention of hiring petitioner because of the "town bully" allegation. He wanted to use this psychological to his advantage.

Petitioner took the psychological test that every candidate takes. He called the Investigation Unit the next day and was told that his status was pending on psychological review. Chief Markman was reached out to again and he said "I knew this would happen, and we are going to fix it with a second psychological interview." At the second interview, petitioner met with Chief Surgeon Simmons and asked "Why do you think they want to disqualify you?" Petitioner responded "I don't know, maybe because I was arrested." Then Chief Surgeon Simmons took petitioner into Inspector Mansfield's office. Inspector Mansfield asked petitioner to explain his arrests and violations. Petitioner explained and Inspector Mansfield said "We will get in touch with you."

Two days later, petitioner's friend called him and said Chief Surgeon Simmons "failed you." He also said Chief Markman said "If you do two years as a correction officer, then he would hire you." This statement led petitioner to believe that something was wrong. If a doctor felt that he was not psychologically fit to be a police officer, how could two years as a correction officer change his or her mind. Also, what gave Chief Markman the confidence that petitioner

would pass a correction officer psychological?

Six weeks prior to this, petitioner took a written psychological for NYS Corrections, and on the same day his friend told him that he failed the NYC psychological, he took the psychological interview for NYS Corrections. Knowing that he was psychologically fit to be a police officer, he took the State psychological interview and answered all the questions the same as he did for the NYC psychological. Approximately six weeks later, petitioner called State Corrections and was informed that he passed their psychological exam. Petitioner concluded that there must be a difference of opinion between doctors.

In August, 1997, NYC Department of Personnel reversed their original character disqualification. Although petitioner's friend said he failed the psychological, petitioner was never told by the Police Department and never received a letter stating so.

In September, 1997, petitioner was scheduled for another written psychological. He called the Scheduling Unit and spoke to Bob Tansey, the Supervisor. He told petitioner that he did not have to take the psychological since he already took it. He checked petitioner's status and told him that his psychological was still pending.

Having been a candidate for police officer with the NYPD for six years, petitioner was well aware of their hiring procedures. Also, knowing many people that have become NYC police officers, it was petitioner's understanding and knowledge that you received your psychological results verbally within two days and if disqualified, you would receive a notice within five months. After hearing this, petitioner concluded that no decision was ever made.

Bob Tansey told petitioner to contact Psychological Services. Petitioner spoke to an employee in Psychological Services who also told him that his psychological was still pending. She said "Hold on and let me look for your file." She came back a few minutes later and said "I cannot find your file." She asked petitioner the name of the doctor that interviewed him. Petitioner told her "Dr. Stern interviewed me, but I had a second interview with Chief Surgeon Simmons and Inspector Mansfield." She put the phone down and petitioner heard her ask Dr. Stern what happened. Petitioner heard Dr. Stern say "I was told to take his application upstairs." The employee from Psychological Services responded to Dr. Stern "that's illegal - that's illegal." The employee told petitioner that his psychological was taken out of their office and that she would have the Director, Dr. Archibald, go upstairs and review it. She said "call me in a couple of days."

Petitioner called her and she said "that Dr. Archibald reviewed it, but we can't put a decision on it because it was taken out of our office." Petitioner concluded at this point in time that Chief Markman would possibly take drastic measures to keep him off the job because of the "town bully" allegation.

A few weeks later, petitioner received a phone call from Lt. Joya telling him to take a psychological. Petitioner told him that he already took it and that the results were still pending seven months later. He said "take this one so you can be the senior man in the academy." The next day petitioner called Psychological Services and spoke to the same lady and told her he was scheduled for another psychological. Petitioner told her that he was concerned because his last psychological was flagged. She said "This one will go through the normal channels."

Petitioner took the psychological and called Lt. Joya two days later. He said "Your psych is pending." Petitioner said "does this mean I am going to be disqualified." He said "No, maybe you will go into the August academy." Meanwhile, it was November and an academy was scheduled for December. Petitioner concluded that his application was possibly flagged again, so he called Psychological Services. Petitioner spoke to the same woman who checked his status and she said "You have to write a letter to the Director of Psychological Services." Petitioner wrote the Director a letter asking for help. He also forwarded a copy to the Department of Personnel. Petitioner's letter was received on November 4, 1997 and on November 5, 1997 a letter of disqualification was put together.

On November 10, 1997, petitioner spoke to his investigator and was told that his status was pending. After receiving the letter that afternoon, petitioner called his Investigator immediately and told her of the letter. She said "my computer says it is pending." Petitioner tried to contact the Director of Psychological Services. He ended up speaking with her assistant. Petitioner told the assistant that he was disqualified and she could not believe it.

After already having passed a State psychological and knowing that Chief Markman was flagging his psychological tests, petitioner had no choice but to file a claim against the NYPD. Two months after petitioner filed this claim, the NYPD scheduled him for a fourth interview. At this point in time, petitioner realized that Chief Markman was "psych fishing" (looking for a doctor that would disqualify him). He even tried to use the "town bully" allegation to convince the doctor to disqualify petitioner. The reason petitioner knows this is because the doctor asked him "What would you think of a person that would say that you were a town bully." At

the conclusion of the interview, the doctor said "I am going to put a decision on this and send it upstairs -- I do not know how long it's going to take."

Approximately three months later, the NYPD scheduled petitioner for his third written psychological and the fifth interview. Petitioner contacted his attorney and he advised petitioner to take it. After passing a State psychological and being evaluated by a private doctor for the appeal process, petitioner's attorney was confident that he would do well again. At the fifth psychological interview, the doctor told petitioner that "these psychs were investigated and you will get your results in two weeks." Petitioner waited two weeks and then called his investigator. She said "Your results are pending." For the next few weeks, she continued to tell petitioner that his results were pending. Knowing that the Scheduling Unit has access to the same computer, petitioner called them. She checked petitioner's status and said "you should have been scheduled for a mini medical." Just to make sure it was not a mistake, on May 12, 1998, petitioner called for a second time and again was told that he should have been scheduled for a mini medical. Chief Markman, somehow, found out about this phone call. He was not happy with the fact that petitioner knew the computer read qualified. He decided to put together some more disqualification letters.

Two weeks after petitioner's fifth psychological interview, they turned over a psychological report alleging that the first four doctors disqualified petitioner. Since it was turned over after the fifth psychological interview, petitioner knew they intended to qualify him on the fifth psychological interview. Petitioner believes that the Legal Division wanted to turn this around, but since Chief Markman has turned this into such a personal vendetta, somehow he prevented it.

Subsequent to his disqualifications, petitioner applied for several other law enforcement jobs. Although he did not have the opportunity to develop the issue during discovery, petitioner believes that he did not obtain the applied for positions on account of stigmatizing information communicated by respondents.

The foregoing is the basis of petitioner's belief that he was disqualified for reasons having nothing to do with his psychological fitness and that the application process was tainted, beset with procedural irregularity, malicious and in bad faith.

B. The Proceedings Below

Petitioner, in light of the foregoing, brought this action alleging, inter alia, that the manner in which respondents and their agents processed his applications, under color of law, was arbitrary, capricious, unlawful and motivated by no legitimate purpose, but rather was designed for purposes other than properly required by statute, ordinance or regulation.

Moreover, petitioner alleged that the manner in which respondents and their agents processed his applications, under color of law, were not a legitimate exercise of municipal authority nor a proper means to achieve any legitimate public purpose.

As such, petitioner alleged that respondents' actions constituted a gross misuse of power possessed by them, under law and regulation.

Petitioner thereby alleged, in the first count, that respondents' actions constituted a violation of petitioner's rights to substantive and procedural due process of law

guaranteed to him by the Constitutions of the United States and State of New York.

In the second count, petitioner alleged that, within several months prior to the commencement of this action, he had applied for several employment positions outside respondent NYPD. Petitioner further noted that he had not received these positions, and, upon information and belief, alleged that he had not received these positions because of derogatory, stigmatizing, defamatory and untrue statements made by respondents and their agents to petitioner's prospective employers that petitioner was disqualified from employment because of psychological unsuitability.

As a result, petitioner contended that respondents' actions, upon information and belief, in publishing derogatory, stigmatizing and untrue information about him to prospective employers was violative of his liberty interest and to his right to substantive and procedural due process of law under the Constitutions of the United States and State of New York.

As a result of the foregoing, petitioner sought monetary damages against respondents.

In lieu of answering, respondents' moved to dismiss the complaint. In so moving, respondents' asserted, among other things, that the complaint failed to state a cause of action. Petitioner duly opposed respondents' motion.

On February 20, 2001, oral argument was held before the District Court (J. Rakoff). For reasons stated in open court on February 20, 2001, the District Court, in an Order dated February 21, 2001 and a Judgment dated February 27, 2001, dismissed the within action with prejudice.

In a Summary Order dated December 4, 2001, the United States Court of Appeals for the Second Circuit affirmed the District Court's judgment. In so doing, the Second Circuit held, with relevance to this petition:

> "However, Johnson can succeed if he can demonstrate that specific defamatory statements uttered by the NYPD deprived him of his liberty interest in a legally protected right. See Siegert v. Gilley, 500 U.S. 226, 233 (1991); Paul v. Davis, 424 U.S. 693, 709-710 (1976); Martz v. Incorporated Village of Valley Stream, 22 F.3d 26, 29-30 (2d Cir. 1994). But Johnson does not provide any factual evidence indicating specifically what the NYPD's statements were, speculating only that (upon information and belief) his failure to find other work was a consequence of the NYPD calumny. Nor does Johnson allege any specific negative employment action caused by the NYPD's supposed aspersions.
>
> In any event, if the state provides a meaningful post-deprivation remedy, a deprivation of property or liberty interests will not be deemed unconstitutional. Zinermon v. Burch, 494 U.S. 113, 125-26 (1990); Hellenic Am. Neighborhood Action Comm. v. City of New York, 101 F.3d 877, 880-81 (2d Cir. 1996). We have held Article 78 proceedings to provide adequate protection. Id. at 881. Johnson can (and is) availing himself of that avenue at present."

This Petition for Writ of Certiorari follows.

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals Departed From The Accepted and Usual Course of Judicial Proceedings When It Held That Petitioner Could Not Assert a Liberty Interest Claim Under 42 U.S.C. §1983

The courts below concluded that petitioner could not maintain his liberty interest claim under 42 U.S.C. §1983 because of the availability of state post-deprivation remedies. Petitioner respectfully submits that the lower court's conclusion constitutes a departure from this Court's precedents so as to call for the exercise of this Court's power of supervision. As such, petitioner respectfully believes that the lower court's ruling must be reviewed and the circumstances under which one may bring a liberty interest claim under 42 U.S.C. §1983, despite the availability of state remedies, clarified.

It is clear that "[w]here a person's good name, reputation, honor or integrity is at stake because of what the government is doing to him," a protectable liberty interest may be implicated that requires procedural due process in the form of a hearing to clear his name. *Walentas v. Lipper*, 862 F.2d 414, 420 (2d Cir. 1988) citing *Wisconsin v. Constantineau,* 400 U.S. 433, 437 (1971).

In *Board of Regents v. Roth*, 408 U.S.C. 564 (1972), this Court recognized an individual's interest in avoiding "a stigma or other disability" that forecloses one's ability to take advantage of future employment opportunities. *Id.* at 573. Once the petitioner makes out a claim of stigmatization, the remedy mandated by the Fourteenth Amendment is notice and

"an opportunity to refute the charge" at a hearing. *Id.* This hearing has become known as a "name clearing hearing."

In asserting a deprivation of a protected liberty interest, besides showing that the information is stigmatizing, petitioner must also show that the information was false and was made public by the offending governmental entity. *Paul v. Davis*, 424 U.S. 693 (1976); *Gentile v. Wallen*, 562 F.2d 193, 197 (2d Cir. 1977); *Brandt v. Board of Cooperative Educational Services*, 820 F.2d 41, 43 (2d Cir. 1987); *Goetz v. Windsor Central School District*, 698 F.2d 606, 610 (2d Cir. 1983).

In the case at bar, petitioner contends that the NYPD published derogatory, stigmatizing and untrue information about him to prospective employers. This information obviously concerned petitioner's alleged psychological unsuitability. As a result, petitioner did not get these jobs, which included the Stamford, Connecticut Police Department, the New York State Police and the Metropolitan Transportation Authority Police. This allegation was sufficient to establish the claimed cause of action under applicable case law, as set forth by this Court.

However, the Court of Appeals gave little consideration to this case law and, instead, citing *Zinermon v. Burch*, 494 U.S. 113, 125-26 (1990) and *Hellenic American Neighborhood v. City of New York*, 101 F.3d 877 (2d Cir. 1996), dismissed the liberty interest claim. In doing so, the lower court held that petitioner has other post-deprivation remedies available to him, including the filing of a state Article 78 proceeding.

Petitioner respectfully submits that the Court of Appeals misconstrued this Court's precedents. The Court of

Appeals, in *Hellenic*, noted that this Court, in evaluating the existence of a liberty interest and the availability of post-deprivation remedies, draws a vital distinction. In discussing the distinction, the Court of Appeals noted:

> "When reviewing alleged procedural due process violations, the Supreme Court has distinguished between (a) claims based on established state procedures and (b) claims based on random, unauthorized acts by state employees. *See Hudson v. Palmer*, 468 U.S. 517, 532, 104 S.Ct. 3194, 3203, 82 L.Ed.2d 393 (1984); *Parratt v. Taylor*, 451 U.S. 527, 541, 101 S.Ct. 1908, 1916, 68 L.Ed.2d 420 (1981), *overruled on other grounds by Daniels v. Williams*, 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986). In the latter case, the Due Process Clause of the Fourteenth Amendment is not violated when a state employee intentionally deprives an individual of property or liberty, so long as the State provides a meaningful postdeprivation remedy. *Hudson v. Palmer*, 468 U.S. at 531, 533, 104 S.Ct. at 3202-03, 3203-04. When the deprivation occurs in the more structured environment of established state procedures, rather than random acts, the availability of postdeprivation procedures will not, ipso facto, satisfy due process. *Id.* at 532, 104 S.Ct. at 3203; *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 435-36, 102 S.Ct. 1148, 1157-58, 71 L.Ed.2d 265 (1982)."

Petitioner respectfully submits that the Court of Appeals, by summarily dismissing the liberty interest claim

based upon its own precedent, did not consider the distinction carved by this Court discussed above. Instead, the Court of Appeals appeared to make a blanket statement that one may never claim a violation of a liberty interest under 42 U.S.C. §1983 if a state post-deprivation review process exists. Surely, this would result in an impermissible restriction of the protection afforded under 42 U.S.C. §1983 and would render this important statutory provision meaningless. This Court must, therefore, revisit the issue of when a plaintiff may claim a violation of a liberty interest under 42 U.S.C. §1983, despite the existence of a state post-deprivation remedy.

Had the Court of Appeals considered this distinction, it should have properly ruled that petitioner's allegations did not relate to random unauthorized acts by state employees. On the contrary, the alleged deprivation "occurred in the more structured environment of established state procedures." Under those circumstances and based upon this Court's precedents, petitioner's liberty interest claim should not have been dismissed merely because of the availability of post-deprivation remedies. This Court should clarify the issue.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

WOLIN & WOLIN, ESQS.
By: Alan E. Wolin, Esq.
Attorney for Petitioner
420 Jericho Turnpike, #215
Jericho, New York 11753
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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 01-7247

[Filed December 4, 2001]

GEORGE JOHNSON,	)
Plaintiff-Appellant,	)
	)
v.	)
	)
THE NEW YORK CITY POLICE DEPARTMENT, HOWARD SAFIR, MICHAEL A. MARKMAN, PATRICK KELLEHER, JOSEPH ANAMONE, JOHN W. CRONIN, ELOISE M. ARCHIBALD, VINCENT MANSFIELD, MACIA ROSS, and JOHN DOES 1-10,	)
Defendants-Appellees.	)
	)

On Appeal From
United States District Court
Southern District of New York
No. 00-cv-8919
Judge Rakoff

PRESENT:
HON. DENNIS JACOBS, HON. ROBERT D. SACK,
HON. ROBERT A. KATZMANN *Circuit Judges*.

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 4th day of December, two thousand and one.

APPEARING FOR APPELLANT:
ALAN A. WOLIN, Jericho, NY

APPEARING FOR APPELLEES:
KATHLEEN ALBERTON, New York, NY
(MICHAEL D. HESS, Corporation
Counsel of the City of New York,
LARRY A. SONNENSHEIN, on the brief).

Appeal from the United States District Court for the Southern District of New York (Rakoff, J.).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the district court be **AFFIRMED**.

George Johnson appeals the district court's dismissal for failure to state a claim of his 42 U.S.C. §1983 suit. Johnson alleges that the New York City Police Department

("NYPD") violated his constitutional rights to procedural and substantive due process by arbitrarily and capriciously determining that he was psychologically unfit for hire as an officer and by making "derogatory, stigmatizing, defamatory, and untrue statements" to other prospective employers. The district court held that Johnson, as an applicant, lacked a property interest in any job with the NYPD, and, in any event, the state provides Johnson an adequate post-deprivation remedy. We affirm.

On three separate occasions, the NYPD found that Johnson was not qualified to join its ranks. Johnson appealed each decision to the Civil Service Commission ("Commission"), but failed to await final review before filing the instant federal action. In the meantime, the Commission rejected Johnson's appeals, and on March 2, 2001, Johnson brought an Article 78 proceeding in New York State Court, challenging the Commission's decision. That action is pending.

To prevail on a substantive and procedural due process claim under the Fifth and Fourteenth Amendments, Johnson must demonstrate that he was deprived of a protected property or liberty interest. *See Hynes v. Squillace*, 143 F.3d 653, 658 (2d Cir. 1998). Johnson cannot claim a property interest in a prospective job. As an applicant, he has only an "unprotected unilateral expectation" of employment. *Donato v. Plainview-Old Bethpage Centr. Sch. Dist.*, 96 F.3d 623, 629 (2d Cir. 1996). However, Johnson can succeed if he can demonstrate that specific defamatory statements uttered by the NYPD deprived him of his liberty interest in a legally protected right. *See Siegert v. Gilley*, 500 U.S. 226, 233 (1991); *Paul v. Davis*, 424 U.S. 693, 709-10 (1976); *Martz v. Incorporated Village of Valley Stream*, 22 F.3d 26, 29-30 (2d Cir. 1994). But Johnson does not provide any factual evidence indicating

specifically what the NYPD's statements were, speculating only that (upon information and belief) his failure to find other work was a consequence of NYPD calumny. Nor does Johnson allege any specific negative employment action caused by the NYPD's supposed aspersions.

In any event, if the state provides a meaningful post-deprivation remedy, a deprivation of property or liberty interests will not be deemed unconstitutional. *Zinermon v. Burch*, 494 U.S. 113, 125-26 (1990); *Hellenic Am. Neighborhood Action Comm. v. City of New York*, 101 F.3d 877, 880-81 (2d Cir. 1996). We have held Article 78 proceedings to provide adequate protection. *Id.* at 881. Johnson can (and is) availing himself of that avenue at present.

The judgment of the United States District Court for the Southern District of New York is hereby affirmed.

FOR THE COURT:
ROSEANN B. MACKECHNIE, CLERK
By:

/s/_____
Lucille Carr, Deputy Clerk

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

00 Civil 8919(JSR)

[Filed February 27, 2001]

GEORGE JOHNSON,	)
Plaintiff,	)
	)
-against-	)
	)
THE NEW YORK CITY POLICE DEPARTMENT, HOWARD SAFIR, MICHAEL A. MARKMAN, PATRICK KELLEHER, JOSEPH ANAMONE, JOHN W. CRONIN, ELOISE M. ARCHIBALD, VINCENT MANSFIELD, MACIA ROSS, and JOHN DOES 1-10,	)
Defendants.	)
	)

JUDGMENT

Whereas the above-captioned case having come before this Court and the matter having come before the Honorable Jed S. Rakoff, United States District Judge, and the Court, on February 21, 2001 having issued its Order dismissing the case with prejudice, it is,

ORDERED, ADJUDGED AND DECREED: That pursuant to the Court's Order dated February 21,2001, the action is dismissed with prejudice.

JAMES M PARKISON:

_____
CLERK

BY:

/s/_____
DEPUTY CLERK

DATED: New York, New York
February 27, 2001

APPENDIX C

UNITED STATES COURT DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

00 Civil 8919 (JSR)

[Dated February 21, 2001]

GEORGE JOHNSON,
Plaintiff,

v.

THE NEW YORK CITY POLICE DEPARTMENT, HOWARD SAFIR, MICHAEL A. MARKMAN, PATRICK KELLEHER, JOSEPH ANAMONE, JOHN W. CRONIN, ELOISE M. ARCHIBALD, VINCENT MANSFIELD, MACIA ROSS, and JOHN DOES 1-10,
Defendants.

JED S. RAKOFF, U.S.D.J.

ORDER

For the reasons stated in open court, *see* transcript, Feb. 20, 2001, the Court hereby dismisses the above-captioned case with prejudice. Clerk to enter judgment.

SO ORDERED.

/s/_____
JED S. RAKOFF U.S.D.J.

Dated: New York, New York
February 21, 2001

APPENDIX D

UNITED STATES COURT DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Docket No. 00 Civil 8919(JSR)

New York, New York

[February 20, 2001]

GEORGE JOHNSON,	)
Plaintiff,	)
	)
v.	)
	)
NEW YORK CITY POLICE	)
DEPARTMENT,	)
Defendant.	)
	)

TRANSCRIPT OF CIVIL CAUSE
FOR CONFERENCE BEFORE
THE HONORABLE JED S. RAKOFF
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff: ALAN E. WOLIN, ESQ.
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Proceedings Recorded by Electronic Sound Recording
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THE CLERK: February 20th, 2001, George Johnson versus New York City Police Department. Counsel, please state your names for the record.

MR. WOLIN: Wolin & Wolin by Alan Wolin for the plaintiff, Your Honor. Good afternoon.

THE COURT: Good afternoon.

MR. GLASS: Bryan Glass, Assistant Corporation Counsel, for the City of New York and other defendants.

THE COURT: Good afternoon. All right. We're here for oral argument on the city's motion, but I think I'd like to hear first from counsel for the plaintiff.

MR. WOLIN: Yes, Your Honor.

THE COURT: Count 1, which alleges a due process violation both procedural and substantive, is premised necessarily on a property interest, but here we have someone who is simply an applicant -

MR. WOLIN: Correct.

THE COURT: - so where is the property interest?

MR. WOLIN: Well, Judge, I think the expectation - I think a property interest basically emanates from an expectation in a particular benefit or a particular process, and I think in this particular situation -

THE COURT: What is your authority for that?

MR. WOLIN: Well, I think, Your Honor - I think the Supreme Court has held that due process is determined by what one's expectations are.

THE COURT: Excuse me. The Supreme Court has repeatedly made clear that the due process clause means what it says, which is that there must be a property interest.

MR. WOLIN: Well, I think the - obviously, as Your Honor noted, there are two aspects to the first count. That's procedural and substantive. I know Your Honor -

THE COURT: But they both are premised upon a property interest.

MR. WOLIN: Well, I don't know, Your Honor, that a substantive due process argument requires a specific property interest. I think that just ties it to the

egregiousness of the conduct of the state actor.

THE COURT: You would still have to have a substantive right to government employment.

MR. WOLIN: Well, I think he has the right, Your Honor, to have his application properly processed, and I think that -

THE COURT: Well, that, of course, again, is back to a procedural issue, but it doesn't attach - this constitutional right doesn't attach, and thus there is an underlying property interest.

MR. WOLIN: Which is -

THE COURT: If I don't have that, then the Government doesn't have to accord me due process, at least not under the due process clause of the Constitution.

MR.. WOLIN: But in this case the agency has a defined procedure which should be followed, and the allegation is that wasn't done.

THE COURT: Well, all right. I think we're going in circles. Now, you also mention in your count an equal protection claim, but I didn't see anything in either side's papers -

MR. WOLIN: Yes, I would withdraw that, Your Honor. I think this is a liberty interest case, and the allegation of due process -

THE COURT: Well, all right. Count 2 -

MR. WOLIN: It would be more like a liberty interest -

THE COURT: - is a defamation -

MR. WOLIN: Liberty interest, Your Honor.

THE COURT: - but, you know, claiming that the defamation deprives the defendant of a liberty interest, as opposed to the property interest that -

MR. WOLIN: Right, and the thought there, Your Honor, is that there was false stigmatizing information which my client alleges was disseminated to other agencies. Now, we haven't had -

THE COURT: Of course, you don't specify the content of the statements.

MR. WOLIN: Well, the statements, Your Honor, is that he failed the - that he was disqualified because he failed the psychological, and he's saying it's not true, and upon information and belief he believes that that was communicated to other agencies to which he applied.

THE COURT: Right. Now, what - I understand that. I mean, to move along, Count 1 must be dismissed because there is no legal basis for the property interest alleged therein.

Count 2 - there, you do have a possible liberty interest that you can make reference to -

MR. WOLIN: And I feel -

THE COURT: - but my question on Count 2 is why isn't there a viable process available in the form of an Article 78 proceeding so that the federal claim will not lie, because the state, which is the alleged depriver, has, in fact, afforded a meaningful post-deprivation remedy?

MR. WOLIN: Well, I don't believe, Your Honor, that a judicial proceeding - to wit, an Article 78 - can substitute for the lack of any meaningful administrative remedy that was provided him.

THE COURT: Well, what about the Second Circuit in *Hellenic American Neighborhood Action Committee versus City of New York*, 101 F. 3d 877, a Second Circuit case from 1996 - has flatly held that in this kind of context the due process clause is not violated, quote:

> " - so long as the state provides a meaningful post-deprivation remedy."

And in that same case, Article 78 proceedings were held to provide, quote:

> "- a perfectly adequate post-deprivation remedy." That was the holding of that case.

MR. WOLIN: In this particular situation, Your Honor, my client, as I indicated in my papers, basically believes that he was deceived with reference to the true grounds for his disqualification. He did appeal to the civil service commission.

He asked for an actual evidentiary hearing before the civil service commission, which was his right, and perhaps that would have been a sufficient remedy, but he was not

given an actual hearing. It was just decided on the papers.

THE COURT: Right, but that's what Article 78 is all about, is agency failures.

MR. WOLIN: Well, Your Honor, I just want to note that, you know, whatever - luckily, and I'm keeping this in my mind, his deadline to file an Article 78 runs in about two weeks, so -

THE COURT: All the better. I mean, I don't know that it would matter whether it had run or not from the standpoint of what I have to decide, but I certainly take great pleasure in hearing that he still has available the Article 78 remedy, though I don't think it would affect one way or the other the legal question before me.

MR. WOLIN: No, obviously I've been keeping - in light of the defendant's arguments, I've been keeping that in my mind.

THE COURT: All right. Well, I think I have to, in light of that, dismiss Count 2. And it would seem to follow from that that the conspiracy counts would have to fall as well.

MR. WOLIN: Everything beyond that, Your Honor, is just derivative.

THE COURT: So I think I have to grant the motion and dismiss the case. I am grateful, though, to counsel for your arguments, because it was important to me to know what was out there and what was not.

Is there anything else we need to take up today?

MR. WOLIN: Not at this time, Your Honor.

THE COURT: All right. Anything else from eloquent defense counsel?

MR. GLASS: Actually, Your Honor, I should point out for the Court just to be - I discovered today also that Mr. Johnson also brought a state court proceeding in 1999 on substantially the same grounds as the instant proceeding.

THE COURT: So that you're saying there may be a res judicata defense as well. Well, I don't reach that, obviously. It's not before me. All right, very good. Thanks very much.

MR. WOLIN: Thank you, Your Honor.

I, KRISTIN M. RUSIN, court approved transcriber, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter.

Transcript is certified only if signed in green ink.

/s/_____

July 14, 2001